Edgar Stephen Pereira v Mohd Nasir bin Abdullah

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8–24–322 OF 2007
KANG HWEE GEE J
22 AUGUST 2008

Trusts and Trustees — Trusts — Existence of — Whether trust incompletely constituted — Whether necessary to look at reasons or circumstances that created trust deed — Whether trust offends any public policy, morality or statute

The plaintiff in this case had applied to enforce a trust deed agreement ('the trust deed') dated 6 November 2001, of which he was the beneficiary, against the defendant who was the trustee. Under cl 9 of the trust deed, the defendant was bound to transfer 50,000 shares in GNT Security Services Sdn Bhd ('GNT') to the plaintiff. In its application the plaintiff had prayed, inter alia, for a declaration that the plaintiff was the beneficial owner of the 50,000 shares in GNT and that the defendant execute all the relevant documents to transfer the said 50,000 shares in GNT to the plaintiff in accordance with the trust deed. The defendant submitted that the trust deed was merely a collateral to a loan given by the plaintiff to GNT and that since that loan had been settled the trust deed was no longer relevant. The defendant further submitted that the trust deed was illegal because GNT, a company in the security industry, was licensed by the Kementerian Dalam Negeri and therefore it had to be owned by 100% bumiputra shareholders. It was therefore the defendant's submission that since the trust deed was illegal it contravened public policy and became unenforceable. The defendant also went on to submit that the plaintiff had not made any payment to the defendant pursuant to the trust deed and that despite the defendant challenging the plaintiff to adduce evidence of such payment the plaintiff had failed to do so. The defendant finally submitted that the trust deed was incompletely constituted because the plaintiff who was the settlor/donor was also the beneficiary. Based on this the defendant contended that the plaintiff's application should be dismissed with costs. The plaintiff maintained that there was only one document in this case and that it was the trust deed and therefore there was no need to look behind the trust deed. The plaintiff also submitted that the trust deed was not an incomplete trust as shares had already been vested. The plaintiff further submitted that the issue of collateral contract was not essential as it was not a part of the action in this court. This was because the loan referred to by the defendant was the subject matter of a separate suit between the plaintiff and GNT and the defendant was not a

party to that suit. It was therefore the plaintiff's contention that the issue of public policy or collateral contract did not arise and that there was only one document for the court to consider and that was the trust deed, and that there was no need to look behind the trust.

Held, granting an order in terms:

(1) It is trite law that when a trust is properly constituted it would be enforced by the court and that in enforcing it the court is not bound to look behind the reasons or circumstances that created it. The fact that there may be other considerations between the trustee and the *cestuis que* trust should not be a factor to consider in its enforcement. Thus the fact that the trust was merely a collateral for a loan from the plaintiff to GNT was irrelevant (see paras 25–26).

(2) The terms of the trust were clear and provide in cl 1 that the shares would be held by the defendant trustee for the plaintiff *cestuis que* trust. As such, the defendant as trustee of the plaintiff, the beneficiary, was obliged to transfer the shares in GNT to the plaintiff in accordance with cl 9 of the trust deed (see para 27).

(3) The transfer of the GNT shares to the plaintiff did not offend any public policy, morality or any statute. As such the trust deed was valid and enforceable. The fact that the Kementerian Dalam Negeri had issued GNT, the security firm, a licence to operate had nothing to do with the ownership of the shares by its shareholders. It would be up to the Kementerian to decide whether or not it was prepared to continue to grant GNT the licence after the shares were transferred to the plaintiff (see para 29).

[Bahasa Malaysia summary

Plaintif dalam kes ini telah memohon untuk menguatkuasakan perjanjian surat ikatan amanah ('surat ikatan amanah tersebut ') bertarikh 6 November 2001, yang mana dia adalah benefisiari, menentang defendan yang merupakan pemegang amanah. Di bawah klausa 9 surat ikatan amanah tersebut, defendan adalah terikat untuk memindahkan 50,000 saham-saham di dalam GNT Security Services Sdn Bhd ('GNT') kepada plaintif. Di dalam permohonannya plaintif telah memohon, antara lain, untuk satu deklarasi bahawa plaintif adalah pemilik benefisial 50,000 saham-saham di dalam GNT dan bahawa defendan menyempurnakan kesemua dokumen yang relevan untuk memindahkan 50,000 saham-saham tersebut di dalam GNT kepada plaintif menurut surat ikatan amanah tersebut. Defendan menghujah bahawa surat ikatan amanah tersebut hanyalah satu cagaran kepada satu pinjaman yang diberikan oleh plaintif kepada GNT dan memandangkan

pinjaman tersebut telah dijelaskan surat ikatan amanah tersebut adalah tidak lagi relevan. Defendan seterusnya menghujah bahawa surat ikatan amanah tersebut adalah salah di sisi undang-undang kerana GNT, satu syarikat di dalam industri keselamatan, diberi lesen oleh Kementerian Dalam Negeri dan oleh itu ia mesti dimiliki oleh 100% pemegang saham bumiputra. Adalah oleh itu hujahan defendan bahawa memandangkan surat ikatan amanah tersebut adalah salah di sisi undang-undang ia bercanggah dengan polisi awam dan menjadi tidak boleh dikuatkuasakan. Defendan juga seterusnya mengemukakan bahawa plaintif tidak membuat sebarang bayaran kepada defendan menurut surat ikatan amanah tersebut dan walaupun defendan mencabar plaintif untuk mengemukakan bukti tentang pembayaran tersebut plaintif telah gagal berbuat demikian. Defendan akhirnya menghujah bahawa surat ikatan amanah tersebut adalah terbentuk secara tidak lengkap kerana plaintif yang merupakan setlor/penderma adalah juga benefisiari. Berdasarkan ini defendan berhujah bahawa permohonan plaintif harus ditolak dengan kos. Plaintif menegaskan bahawa hanya terdapat satu dokumen di dalam kes ini dan ia adalah surat ikatan amanah tersebut maka tidak terdapat keperluan untuk meneliti surat ikatan amanah tersebut. Plaintif juga menghujah bahawa surat ikatan amanah tersebut bukan satu amanah yang tidak lengkap kerana saham-saham telah diletakkan. Plaintif seterusnya menghujah bahawa isu kontrak kolateral adalah tidak penting kerana ia bukan sebahagian daripada tindakan mahkamah ini. Ini adalah kerana pinjaman yang dirujuk oleh defendan adalah subjek teras satu guaman yang berasingan di antara plaintif dan GNT dan defendan bukan satu pihak kepada guaman tersebut. Maka oleh itu hujahan plaintif bahawa isu polisi awam atau kontrak kolateral tidak berbangkit dan hanya terdapat satu dokumen untuk mahkamah mengambilkira dan ia adalah surat ikatan amanah tersebut, dan bahawa tidak terdapat keperluan untuk meneliti surat ikatan amanah tersebut.

Diputuskan, membenarkan perintah dengan syarat:

(1) Ia adalah undang-undang yang nyata bahawa apabila satu amanah dibentuk secara betul ia akan dikuatkuasakan oleh mahkamah dan dalam menguatkuasakannya mahkamah tidak terikat untuk meneliti alasan-alasan atau keadaan-keadaan yang membentuknya. Fakta bahawa mungkin terdapat pertimbangan-pertimbangan lain di antara pemegang amanah dan amanah *cestuis que* tidak harus menjadi faktor untuk mempertimbangkannya di dalam penguatkuasaannya. Oleh itu fakta bahawa amanah tersebut hanyalah satu cagaran untuk satu pinjaman daripada plaintif kepada GNT adalah tidak relevan (lihat perenggan 25–26).

(2) Terma-terma amanah tersebut adalah jelas dan diberikan di dalam klausa 1 bahawa saham-saham tersebut akan dipegang oleh pemegang amanah defendan untuk amanah *cestuis que* plaintif. Oleh itu, defendan sebagai pemegang amanah plaintif, benefisiari tersebut, adalah diwajibkan untuk memindah saham-saham di dalam GNT kepada plaintif menurut klausa 9 surat ikatan amanah tersebut (lihat perenggan 27).

(3) Pemindahan saham-saham GNT kepada plaintif tidak melanggar mana-mana polisi awam, moral atau sebarang undang-undang. Oleh itu surat ikatan amanah tersebut adalah sah dan boleh dikuatkuasakan. Fakta bahawa Kementerian Dalam Negeri telah mengeluarkan kepada GNT, firma keselamatan tersebut, satu lesen untuk beroperasi tidak ada kena mengena dengan pemilikan saham-saham oleh pemegang-pemegang sahamnya. Ia adalah bergantung kepada Kementerian Dalam Negeri untuk memutuskan sama ada ia bersedia atau tidak untuk menerus memberikan lesen kepada GNT selepas saham-saham tersebut dipindahkan kepada plaintif (lihat perenggan 29).]

Notes

For cases on existence of trusts, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2601–2604.

Cases referred to

Palaniappa Chettiar v Arunasalam Chettiar [1962] MLJ 143, PC (refd)
S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204, FC (refd)
TSC Education Sdn Bhd v Kolej Yayasan Pelajaran Mara & Anor [2002] 5 MLJ 577; [2002] 2 CLJ 581, HC (refd)
Teo Ah Bin @ Teo Eng Bin v Tan Kheng Guan [2002] 3 MLJ 121; [2002] 7 CLJ 206, HC (refd)
Yap Joyce v Tee Molly & Anor [2000] 3 MLJ 599; [2000] 6 CLJ 220, HC (refd)

Legislation referred to

Contracts Act 1950 s 24(b), 24(e)

Ajeet Kaur (Ashok Puri Hanifah & Co) for the plaintiff.
Andrew Davis (Andrew Davis Krishman & Co) for the defendant.

Kang Hwee Gee J (delivering oral judgment ex tempore):

[1] This is an application by the plaintiff for the following orders:

(1) a declaration that the defendant is the trustee of 50,000 ordinary shares

in GNT Security Services Sdn Bhd in accordance with the trust deed agreement dated 6 November 2001 for the benefit of the plaintiff;

(2) a declaration that the plaintiff is the beneficial owner of 50,000 ordinary shares in GNT Security Services Sdn Bhd in accordance with the trust deed agreement dated 6 November 2001;

(3) that the defendant forwards copies of all notices, reports, accounts, circulars, prospectus and all other relevant documents in accordance to the terms in the said trust deed to the plaintiff within seven days from the date of the order of this court;

(4) that the defendant executes all the relevant documents to transfer the 50,000 ordinary shares in GNT Security Services Sdn Bhd in accordance with the trust deed agreement dated 6 November 2001 to the plaintiff within seven days from the date of the order of this court;

(5) costs;

(6) that the parties are given the liberty to request for further orders if need be.

MISS AJEET KAUR FOR THE PLAINTIFF

[2] The defendant executed a trust deed for the benefit of the plaintiff. See trust deed exh 'ESP-1' encl 2.

[3] The salient terms of the trust deed read as follows:

Recitals —

(1) At the request of the Beneficiary, the Trustee became the registered holder of fifty thousand (50,000) ordinary shares of Ringgit Malaysia One (RM1.00) each (hereinafter called 'the said Shares') in GNT SECURITY SERVICES SDN. BHD. (Company No. 383834-K) a company incorporated in Malaysia and having its place of business at No. 18, 3rd Floor, Jalan 15/48A, Sentul Raya, Sentul 51000 Kuala Lumpur (hereinafter called 'the Company').

(2) The said Shares were subscribed and paid by the Trustee with moneys belonging to the Beneficiary as is herein admitted and acknowledged by the Trustee.

Clause 9. The Trustee will at all times and from time to time hereafter whenever requested by the Beneficiary sign, execute and deliver any transfer, proxy form, receipt, notice or other instrument or document relating to the said Shares or any dividends or proceeds arising therefrom or any rights or privileges exercised therewith.

[4] There is only one document for the court that is the trust deed and there is no need to look behind the trust. See *Yap Joyce v Tee Molly & Anor* [2000] 3 MLJ 599; [2000] 6 CLJ 220 at p 221 held (1) and (2):

(1) The trust deed created by the donor was an express trust providing for a life interest for the donor and upon her death, the second defendant was entitled to the said property. The court did not have to look for extrinsic evidence to see if there was a trust created. The words contained were expressive. The plaintiff volunteered to be a trustee. It was plain upon reading the trust deed that in order to give effect to the trust created, the donor transferred the said property to the plaintiff by way of Form 14A.

(2) There was nothing uncertain about the trust deed nor was there any ambiguity with regard to the intention to create a trust. The said trust deed being a trust created over real property and in writing had complied with the three certainties of a trust, ie, certainty of the subject matter to be held on trust, certainty of the object and certainty of the words creating the trust. Further, the plaintiff never made any attempt to promptly declare the trust deed as invalid.

[5] See company search exh 'ESP-2' encl 2. The defendant is holding 999,000 shares in GNT.

[6] Under cl 9 of the trust deed the defendant is bound to transfer the 50,000 shares to the plaintiff.

MR ANDREW DAVIS FOR THE DEFENDANT

[7] The trust deed was intended as a collateral to a loan given by the plaintiff to GNT Security Services Sdn Bhd.

[8] The loan of RM341,611.91 was given to GNT Security Services Sdn Bhd by the plaintiff and a company called FWIG (M) Sdn Bhd.

[9] The plaintiff's contention is that RM212,130 has been paid to the plaintiff and the balance sum due is RM129,481.91 is now owing to FWIG (M) Sdn Bhd. It is our contention that the trust deed is no longer relevant as the said loan had been settled.

[10] The plaintiff has commenced a civil suit against GNT Security Services Sdn Bhd in the Kuala Lumpur High Court S4–22–1301 of 2007.

[11] The trust deed is illegal because the company GNT is in the security industry and it is licensed by the Kementerian Dalam Negeri which has to be owned 100% by bumiputra shareholders. Refer to the letter from Kementerian Dalam Negeri (exh 'MN-2' encl 4) to GNT dated 25 July 2000 (before the coming into being of the trust dated 6 November 2001). See s 24(b) and (e) of the Contracts Act 1950.

[12] The licence issued to GNT was pursuant to the *Perkhidmatan Kawalan Secara Perniagaan Dan Penyiasatan Persendirian di bawah s 2(a) dan (b) Akta Ajensi Persendirian.* See *TSC Education Sdn Bhd v Kolej Yayasan Pelajaran Mara & Anor* [2002] 5 MLJ 577; [2002] 2 CLJ 581 .

[13] Article 6 of GNT states that trusts are not recognised. See encl 6 exh 'MN-5' .

[14] A trust that contravenes public policy (in this case contravention of the condition of the licence given by Kementerian Dalam Negeri to operate the security company) is illegal and cannot be enforced. See *Palaniappa Chettiar v Arunasalam Chettiar* [1962] MLJ 143 at p 144:

> In view of the finding that the respondent had arranged the transfer for an illegal or fraudulent purpose, and as the fraudulent purpose had in fact been carried out, the respondent was precluded from obtaining the aid of the court.

The trust deed was knowingly executed by both parties with the knowledge that transfer cannot take place in the light of the *bumiputra* requirement.

[15] It is our contention that the trust deed was merely a collateral and our reasons are as follows:

(i) That the plaintiff had not contacted our client or GNT to exercise any of its rights under the alleged deed of trust until recently.

(ii) The trust deed was executed on 6 November 2001 and the first letter in relation was dated 14 February 2007.

(iii) The plaintiff has not attended any of the meetings of GNT nor given any instruction to the defendant in regard to the company affairs.

(iv) The plaintiff has not made any payment to the defendant pursuant to the trust deed. The defendant has challenged the plaintiff to adduce evidence that payment has been made but the plaintiff has failed.

(v) The defendant was not represented by a solicitor when the trust deed was drafted. See *Teo Ah Bin @ Teo Eng Bin v Tan Kheng Guan* [2002] 3 MLJ 121; [2002] 7 CLJ 206 at held (1) and (2):

(1) For a trust to be created, there must be a clear intention to create a trust — the usage of the word 'trust' per se in the absence of other factors was insufficient; the plaintiff's conduct showed an assertion as a creditor and not beneficiary of a trust. Furthermore, the initiation by the plaintiff of an action for specific performance was clearly inconsistent with a claim for a declaration of trust and established the election by the plaintiff as to specific performance, resulting in estoppel by election against a trust (pp 210e–f & 211h of CLJ).

(2) The nature of the plaintiff's claim herein was based on a contract for money advanced and not on trust, resulting, constructive or otherwise; hence, limitation would invariably set in if no claim was instituted within six years under s 6(1)(a) of the Limitation Act 1953. Therefore, the failure by the plaintiff to institute action within six years resulted in the claim being statute-barred (p 212 a–b of CLJ).

[16] The plaintiff's claim in encl 1 should be dismissed with costs.

[17] The trust deed as it is in this case is incompletely constituted trust because the plaintiff who is the settlor/donor is also the beneficiary. It is our contention that the plaintiff had not given the money as stated in recital (2) of the trust deed dated 6 November 2001. The plaintiff also has failed to adduce informal evidence that the said sum was paid and the amount paid.

[18] Clause 12 of the trust deed requires the legal costs to be paid by the beneficiary. However in this case the legal costs was paid by GNT. See encl 7 exh 'MN-7'.

REPLY BY MISS AJEET KAUR

[19] This is not an incomplete trust as shares had already been vested.

[20] Collateral contract not essential and not part of the action in this court. A friendly loan mentioned is the subject matter of a separate suit in the Kuala Lumpur High Court Suit No S4–22–1301 of 2007. In the S4 suit judgment in default had been taken by the plaintiff against the company GNT. The parties to the suit are different. The defendant in the present suit is not a party in the S4 suit.

[21] Exhibit 'MN-2' encl 4 which is the letter from Kementerian Dalam Negeri dated 25 July 2000 is merely a condition imposed to the granting of

a licence. Issue of public policy does not arise. See *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 at p 208:

> The expression 'public purpose' is incapable of a precise definition. No one in fact has attempted to define it successfully. What all the textbooks have done to suggest the tests to be applied in determining whether a purpose is a public purpose. Various tests have been suggested. But in my view it is still best to employ a simple commonsense test, that is, to see whether the purpose serves the general interest of the community.

[22] Not true defendant did not understand the trust deed. He is a business man.

FINDINGS AND DECISION

[23] The plaintiff is here to enforce a trust deed of which he is the beneficiary against the defendant who is the trustee.

[24] As the authors of *Underhill and Hayton, Law Relating to Trusts and Trustees* say at p 7:

> A contract is essentially a bargain: it is based upon agreement and it requires for its validity some valuable consideration or to be incorporated in a deed, the formalities for a deed importing the consideration.
>
> A trust is an equitable obligation which creates a proprietary interest in the beneficiaries capable of binding third parties. No consideration is required for its validity: it is, perhaps, best regarded as the equitable equivalent of a common law gift and so leaves no right in the creator of the trust, known as the settlor, to enforce, vary or revoke the terms of the trust, unless such rights be expressly reserved at the time of the creation of the trust.

[25] It follows therefore that a trust properly constituted will be enforced by the court on the obligation of the trustee as set out in the trust and in enforcing it the court is not bound to look behind the reasons or circumstances that creates it. The fact that there may be other consideration between the trustee and the *cestuis que* trust should not be a factor to consider in its enforcement.

[26] The submission of counsel for the defendant that the money that was used to purchase the shares did not come from the plaintiff but from him and that the trust was merely a collateral for a loan from the plaintiff to GNT is irrelevant.

[27] The term of the trust is clear. The plaintiff was the settlor of the trust as it is clearly set out in recital (2) of the trust deed that he had provided the money for the purchase of the GNT shares and cl 1 clearly says that the shares would be held by the defendant trustee for the plaintiff *cestuis que* trust. Clause 9 of the trust deed reads:

> The trustee will at all times and from time to time hereafter whenever requested by the Beneficiary sign, execute and deliver any transfer, proxy form, receipt, notice or other instrument or document relating to the said Shares or any dividends or proceeds arising therefrom or any rights or privileges exercised therewith.

[28] The defendant as trustee of the plaintiff the beneficiary is therefore obliged to transfer these shares to the plaintiff in accordance with cl 9.

[29] It is trite that a trust otherwise valid will not be enforced if it offends against morality, public policy or the provisions of any statute. The transfer of the GNT shares to the plaintiff does not offend against any public policy morality or any statute. The fact that the Kementerian Dalam Negeri had issued licence to operate the security firm to GNT has nothing to do with the ownership of the shares by its shareholders. It would be up to the Kementerian Dalam Negeri to decide whether or not it was prepared to continue to grant GNT the licence after the shares were transferred to the plaintiff.

[30] There shall accordingly be an order in terms.

Application allowed.

Reported by K Nesan